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REVISING EXECUTIVE ORDER 11246: FULFILLING THE PROMISE OF AFFIRMATIVE ACTION

Ronald Reagan is being offered an historic opportunity to reaffirm the nation's commitment to, and advance, affirmative action. He could do so by following the advice of the Department of Justice and signing proposed changes to Executive Order 11246 now before him. These changes would go far to restore the original meaning of affirmative action by eliminating the current requirement that federal government contractors use quotas and other race-conscious practices when hiring. Reagan is expected to decide whether to sign the Order shortly after returning from the summit talks with Soviet leader Mikhail Gorbachev. And if signed, it would stop much of the damage being inflicted on U.S. society and the economy by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) when it requires "goals and timetables" for minority hiring.

These OFCCP regulations, enforced by a bureaucracy unresponsive to the public's wishes, apparently unaccountable to the President, and sanctioned by federal judges, have transformed almost completely the notion of equal opportunity and affirmative action originally envisioned by Executive Order 11246 signed by Lyndon Johnson in 1965 and other presidential Orders dating back to 1941. Rather than prohibiting discrimination and achieving a colorblind society, OFCCP has imposed a new dangerous mutation of racism by requiring government contractors to use race and sex-conscious hiring practices for all of their work, including nongovernment contracts as well as contracts with the federal government. This racism takes the form of numerical "goals and timetables," a euphemism for "quotas." Selecting a job applicant because of such group characteristics as skin color or sex, rather than individual merit, is constitutionally impermissible and should be morally repugnant.

Some "civil rights" activists claim that alleged gains made in the past decade by minorities under OFCCP would be rolled back if the Order were revised. There is no basis for this assertion. Those

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Americans actually victimized by discrimination will retain all their legal rights and remedies under the Civil Rights Acts. The revised Order will not affect the requirement that contractors maintain and report employment statistics. The Order simply will ensure that statistics alone no longer are a legal basis for a finding of discrimination, or a defense to charges of reverse discrimination.

As for the alleged gains for minorities under OFCCP, "goals and timetables" have proven to be a costly failure. They have not brought the lasting changes in the composition of the workforce sought by those who have fought discrimination. Instead of through goals and timetables, true affirmative action is to be achieved by increased recruitment and training programs. By 1982, over $1 billion annually was being spent by the Fortune 500 corporations on complying with Equal Employment Opportunity regulations; hundreds of millions more are spent by government regulators. None of this has created a single job--except in the federal bureaucracy and in corporate EEO compliance offices.

This sad legacy of goals and quotas has been well documented in a recent Washington Legal Foundation monograph by Professor Herman Belz of the University of Maryland entitled Affirmative Action from Kennedy to Reagan: Redefining American Equality. The evidence shows that OFCCP quotas have not significantly helped any minority group and may have hurt some. Example; between 1974 and 1980, the actual percentage of employed black males who worked in OFCCP-covered businesses actually fell. Another study indicates that black men and women achieved greater wage gains before the OFCCP vigorously began to execute the quota system in 1974.

The evidence now demonstrates that goals can serve as caps or ceilings. This means that, as soon as an employer has satisfied the numerical goals set by OFCCP, he can cease affirmative recruitment activities. Just as bad, of course, is the fact that goals preferring some classes of Americans discriminate against other classes--minorities and nonminorities. Example: the New Orleans Police Department's 50 percent black promotion quota is being challenged by Hispanic and female police officers, who argue convincingly that it discriminates against them. Example: blacks have been kept out of the New York City Starret City housing project because the quota of 30 percent minorities has been filled. Example: white males applying for blue collar jobs have been rejected in favor of less qualified minorities.

The quota system used by OFCCP has become increasingly racially divisive and patronizing. Not surprisingly, it is being rejected even by some of its intended beneficiaries. Four Hispanic firefighters in Miami, for example, refused to be promoted on the basis of "goals." They insisted, instead, to be considered on their own merits and qualifications. Recent polls, meanwhile, reveal that most minorities disapprove of racial or sexual preferences in hiring. When asked, for

instance, if minorities should be given preference in hiring, only 23 percent of the blacks queried in a nationwide poll said yes; 77 percent of the blacks agreed that individual ability should be the main consideration in hiring.[1]

While there appears to be a consensus among White House officials and Cabinet secretaries that the OFCCP quota system must be changed, there is some debate about the method of doing so. Rather than amend the Executive Order, Secretary of Labor William Brock, Secretary of Transportation Elizabeth Dole, and others suggest that mere modification of the regulations is sufficient. This "regulatory option," however, is seriously flawed and should be rejected.

For one thing, the source of authority for the current OFCCP regulations is Executive Order 11246. As such, only a revised Executive Order can set the record straight by making it unmistakably clear that the nondiscrimination clause of that Order prohibits the use of "goals and timetables." Just as Congress has the authority and duty to correct errant behavior in regulatory agencies by remedial legislation, the President has the authority and duty to correct the regulatory excesses of OFCCP, an agency which is a creature not of Congress, but of the Executive. It is extremely unlikely, moreover, that Congress would enact OFCCP's quota system, for it contradicts language in the Civil Rights Acts.

For another thing, a mere revision of the OFCCP regulations also would not affect the numerous court decisions, based on a distorted interpretation of Executive Order 11246, that the use of quotas is a defense to charges of reverse discrimination. Finally, it seems unrealistic to expect OFCCP to revise its regulations if that would mean, as it surely would, a reduction in OFCCP authority. After all, revisions to OFCCP regulations were promised four years ago.

Ronald Reagan has clearly and repeatedly expressed his strong views deploring quotas and preferential treatment. He clearly and repeatedly has asserted his commitment to moving America toward a colorblind, genderblind, creedblind society. He now can translate his assertions into policy. He can sign the Executive Order abolishing quotas.

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1. Public Opinion Magazine, August-September 1985, p. 42.